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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by New York Telephone	)	
Company (d/b/a Bell Atlantic -	)	
New York), Bell Atlantic	)	CC Docket No. 99-295
Communications, Inc., NYNEX Long	)	
Distance Company, and Bell Atlantic	)	
Global Networks, Inc. for	)	
Authorization to Provide In-Region,	)	
InterLATA Services in New York	)	

PETITION FOR RECONSIDERATION OF CLOSECALL AMERICA, INC.

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PETITION FOR RECONSIDERATION OF CLOSECALL AMERICA, INC.

CloseCall America, Inc. ("CloseCall"), by its attorneys, hereby submits this petition for reconsideration of the Commission's Order granting Bell Atlantic's application (the "Application") for authority to provide in-region interLATA service in the State of New York.[1] As shown below, the Commission should reconsider the Order because the Order failed to give proper weight and consideration to CloseCall's comments regarding Bell Atlantic's compliance with resale issues under Checklist Item 14. Accordingly, the Application should have been denied.

I. Introduction and Summary

CloseCall is a new telecommunications company which went into business on April 1, 1999. CloseCall's goal is to serve the residential and small business markets that previously

[1] Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, *Memorandum Opinion and Order,* FCC 99-404, CC Docket No. 99-295 (rel. Dec. 22, 1999) (the "Order").

have not been the focus of competitive local exchange carriers. CloseCall participated in this proceeding by submitting comments addressing several Bell Atlantic practices that create barriers to resale competition in these markets, including deficiencies in operational support systems and billing. This petition, however, is limited to Bell Atlantic's resale policies, which effectively prevent the development of resale competition in New York.

In its comments, CloseCall identified three ways in which Bell Atlantic violated the resale requirements of Checklist Item 14 under Section 271 of the Communications Act.[2] They are as follows:

(1) Bell Atlantic squeezes the margins between its retail and wholesale offerings so as to make resale impractical and, in some cases, sets its retail prices below the combined prices of the underlying components of the service.

(2) Bell Atlantic places unwarranted restrictions on the purchase of services for resale, including limitations on what retail services can be resold.

(3) Bell Atlantic's resale prices do not account for the wide variations in margins and avoided costs among its services.

As described below, the Order either fails to address or misconstrues each of these concerns and, as a consequence, erroneously concludes that Bell Atlantic complies with the requirements of Checklist Item 14 and of Section 271 as a whole. Thus, the Commission should reconsider grant of Bell Atlantic's Application.

II. Bell Atlantic Does Not Meet the Resale Requirement Because It Has Created a Price Squeeze. (Checklist Item 14)

In its comments, CloseCall showed that Bell Atlantic's prices to resellers often are so as to make it impossible for a reseller to compete with Bell Atlantic and earn a profit. While this is

[2] 47 U.S.C. § 271(c)(2)(B)(xiv).

not the case for every service that is purchased by resellers, it is true in enough cases that it is impracticable for a reseller to offer a package of services that will be attractive to consumers.

This concern is made particularly evident when Bell Atlantic's retail prices for finished services are compared to the prices for the components of those services. As described in CloseCall's comments, end-to-end switched access costs approximately 7.5 cents per minute in New York, a rate that is much higher than in other states.[3] At the same time, Bell Atlantic offers regional toll service – a finished service that includes access as a component – for six cents per minute. Charging 1.5 cents per minute more for a component of a service than for the finished service itself is more than a price squeeze; it is *per se* evidence of predatory pricing.

The Order responds to these concerns by stating that the New York Commission approved Bell Atlantic's prices and that there is "no evidence" that those prices were not set in accordance with statutory requirements.[4] These responses do not, however, address the specific issues raised by CloseCall and are contrary to the Commission's pre-existing precedent.

First, although the Order describes the price squeeze issue, it does not respond to or, apparently, consider CloseCall's specific comments on this issue. It only addresses the distinct question of whether Bell Atlantic should be required to adopt different discounts for different services.[5] The Order's failure to address the price squeeze issue is a violation of the basic requirements of the Administrative Procedures Act.[6]

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[3] CloseCall Comments at 5. The same service is available in California, Illinois, Ohio and Kentucky for approximately three cents per minute. *Id.*

[4] Order, ¶ 383.

[5] As described below, the Order also errs in its analysis of this issue. *See infra* Part IV.

[6] *See generally* 5 U.S.C. § 554(c)(1) (requiring agency consideration of parties' arguments).

Second, even if the bare mention of the CloseCall's price squeeze concerns could be deemed to be a sufficient analysis of the issue, it is contrary to prior Commission precedent in Section 271 cases and the analytic process described in the Order itself. The Commission determined in the *SBC Oklahoma Order* that it will not blindly defer to state commission conclusions regarding compliance with checklist requirements, but is "required to make an independent determination," and this conclusion was affirmed by the Court of Appeals.[7] While the Order indicates that the Commission can give "substantial weight" to a state commission's conclusions, the Commission will do so only when a state engages in an "exhaustive and rigorous investigation" and provides evidence to support its conclusions.[8] Here, the New York Commission did not consider CloseCall's concerns and, in fact, does not even mention them in its submission to the Commission.[9] Thus, under the standards adopted in the *SBC Oklahoma Order* and in the Order itself, the New York Commission's views on this resale issue cannot be accorded any weight and the Order's reliance on the New York Commission's general conclusions was impermissible.

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[7] Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, *Memorandum Opinion and Order,* 12 FCC Rcd 8685, 8695 (1997) (the *"SBC Oklahoma Order"*), *affirmed, SBC Communications, Inc. v. FCC,* 138 F.3d 410, 416 (D.C. Cir. 1998) (application cannot be granted "[u]nless the FCC concludes *to its own satisfaction* that the applying BOC has satisfied" the requirements of Section 271) (emphasis added).

[8] Order, ¶ 51. *See also* Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, *Memorandum Opinion and Order,* 13 FCC Rcd 20599, 20618 & n.50 (1998) (the *"Second BellSouth Louisiana Order"*) (criticizing Louisiana Commission for failure to provide evidence supporting conclusion that BellSouth complied with checklist items).

[9] *See* New York Commission Reply Comments at 40-41 (discussion of resale issues).

Finally, even if the Commission normally would rely on unsupported state commission representations, it was incorrect to do so in this case. As CloseCall demonstrated in its comments, Bell Atlantic's pricing is set so that individual components of finished services cost other carriers more than the retail prices of those services. It is inconceivable that such pricing could comply with the most basic cost recovery requirements, let alone with the TELRIC pricing requirements for unbundled network elements or with the statutory requirements for wholesale resale. Consequently, even if the Commission gave great deference to state conclusions regarding checklist compliance, it could not afford that deference to the New York Commission in this case and is required to conclude that Bell Atlantic's pricing does not meet the requirements of Checklist Item 14. Indeed, when the Commission has been faced with state conclusions regarding resale that were contrary to the requirements of Section 271 and the Commission's rules, it specifically has rejected those conclusions.[10]

III. Bell Atlantic Does Not Meet the Resale Requirement Because It Unlawfully Limits the Services Available to Resellers. (Checklist Item 14)

The second way in which Bell Atlantic violates the resale requirements of Checklist Item 14 is through limitations on what services can be resold. As CloseCall explained in its comments, Bell Atlantic limits the services that can be obtained at wholesale prices by allowing

[10] *See* Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Louisiana, *Memorandum Opinion and Order,* 13 FCC Rcd 6245, 6284-88 (1998) (the *"First BellSouth Louisiana Order"*) (rejecting state commission conclusion that failure to offer contract service arrangements at a wholesale discount was not a violation of resale requirements of Section 271).

its retail marketing department to determine how services can be packaged for resale.[11] This means that, among other things, otherwise-available vertical services are not available to resellers of Bell Atlantic services. This is a plain violation of both Section 251(c)(4) and Section 271(c)(2)(B)(xiv) of the Communications Act, which require that all retail services be made available at wholesale prices. Indeed, in the *First BellSouth Louisiana Order,* the Commission held that the failure to offer bulk services at wholesale rates constituted a violation of Section 271's resale requirements.[12]

The result of Bell Atlantic's policies is to deny resellers the opportunity to create new service packages that combine Bell Atlantic's retail services in different ways than Bell Atlantic chooses to combine them. This deprives consumers of the opportunity to take advantage of innovative service combinations that resellers might offer.[13] Thus, Bell Atlantic's actions are not merely a technical violation of the checklist, but have real consequences for consumers.

The Order, in responding to these concerns, notes that Bell Atlantic is not required "to provide its retail customers with all of the vertical services that Bell Atlantic is capable of providing" and concludes that Bell Atlantic meets its obligations as to services not available at retail by offering them as unbundled elements.[14] This misses the point. Bell Atlantic's

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[11] CloseCall Comments at 5, *citing* Application, Appendix H, Volume 2 Tab 2, Tariff P.S.C. No. 915.

[12] *First BellSouth Louisiana Order,* 13 FCC Rcd at 6284-88.

[13] While it is true that resale does not afford carriers the same level of flexibility as facilities-based service or combining unbundled network elements, under the Commission's rules resellers do have the ability to combine available retail services into offerings that may not be available from incumbent LECs.

[14] Order, ¶ 397.

restrictions have the effect of limiting resellers' access to wholesale prices for *retail services,* something the Commission's case law specifically prohibits.[15] These restrictions result from determinations by Bell Atlantic's retail marketing division about what retail services will be made available for resale and under what conditions. That is precisely what Bell Atlantic is not allowed to do. Instead, it must, as required by the statute, make its retail services available at wholesale prices and "without unreasonable or discriminatory conditions or limitations."[16] Because Bell Atlantic's restrictions on the availability and combination of services for resale violate these requirements, the Application should have been denied.

IV. Bell Atlantic's Resale Pricing Fails to Reflect the Differences in Underlying Costs Among Its Retail Services. (Checklist Item 14)

Bell Atlantic's wholesale prices are set by applying a uniform discount to all of its retail services. This discount does not vary, even when the avoided costs vary widely. CloseCall's comments explained how this "one-size-fits-all" discount makes it impossible for resellers to create customized packages of services for their customers or to attain sufficient profits margins to sustain a successful business.[17] Even if this showing did not demonstrate that Bell Atlantic was failing to offer services for resale on nondiscriminatory terms and conditions, it established that there are serious public interest concerns that arise from the effective foreclosure of competition via resale. Nevertheless, the Order dismisses these concerns by deferring to the

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[15] *First BellSouth Louisiana Order,* 13 FCC Rcd at 6284-8 (Bell company cannot deny wholesale discount for bulk services).

[16] 47 U.S.C. § 251(c)(4).

[17] CloseCall Comments at 6.

New York Commission's determinations regarding wholesale discounts.[18] This conclusion is incorrect for two distinct reasons.

First, as described above, there is no basis for the Commission to defer to New York's conclusions. There is no evidence, in either of the New York Commission's filings or anywhere else in the record, to suggest that the New York Commission even has considered the effects of across-the-board discounts.[19] Thus, under the Commission's own precedent, it cannot defer to the New York Commission's determinations.[20]

Second, the Order's conclusion that uniform rates are permissible is inconsistent with the Commission's earlier conclusions regarding bulk services in the *BellSouth South Carolina Order.*[21] In that decision, the Commission specifically recognized that it was appropriate to vary the amount of resale discounts based on differences in avoided costs between bulk services and non-bulk services.[22] The Order provides no explanation for this departure from the *BellSouth South Carolina Order* and there is no principled basis for this change. Indeed, if incumbent local exchange carriers are to be afforded the benefits of lower discounts for bulk services that have low avoided costs, it would be unreasonable under Section 251(c)(4) to deny competitive local

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[18] Order, ¶ 383.

[19] *See* New York Commission Comments at 148; Evaluation of New York Commission Reply Comments at 40-41 (discussion of resale issues)

[20] *See supra* notes 7-9 and accompanying text.

[21] Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina, *Memorandum Opinion and Order,* 13 FCC Rcd 539, 661 (1998) (the *"BellSouth South Carolina Order"*). The Commission followed the same principle in the *First BellSouth Louisiana Order,* 13 FCC Rcd at 6284-88.

[22] *BellSouth South Carolina Order,* 13 FCC Rcd at 661.

exchange carriers the benefit of larger discounts for services, such as vertical services, that have relatively high avoided costs. Moreover, it is impermissible for the Commission to depart from its prior determinations without a reasoned explanation for doing so.[23] Consequently, the Order erred in its analysis of this issue.

V. Conclusion

For all these reasons, the Commission should reconsider the Order and deny Bell Atlantic's Application.

Respectfully submitted,

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[23] *See generally Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) *cert. denied*, 456 U.S. 923 (1971).

Certificate of Service

I, Vicki Lynne Lyttle, hereby certify that on this 21st day of January, 2000, I caused copies of the foregoing Petition for Reconsideration of CloseCall America, Inc. to be served upon the parties listed below via regular mail:

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Attachment A

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